

### **REMARKS**

This Amendment is in response to the Office Action mailed on October 20, 2004, which re-opened prosecution. A Petition for Two Month Extension of Time, to and including March 21, 2005 (because March 20, 2005 fell on a Sunday), with a check for the appropriate fee of \$225.00, is enclosed. In the event any additional fees are necessary in connection with the present Amendment, kindly charge the cost thereof to our Deposit Account No. 13-2855.

#### **Response to Claim Objections**

Claims 1 and 20 were objected to on the basis of certain informalities. In response, claim 1 is amended as suggested in the Office Action, by changing "greater than said diameter" in line 6 to -- greater than the diameter --. Claim 20 was also amended as suggested in the Office Action, by changing "zone of a septic tank when the tee is mounted at a septic tank outlet" to -- zone of the septic tank when the tee is mounted at the septic tank outlet --.

#### **Response to Claim Rejections Under 35 U.S.C. § 102**

Claims 1, 4, 6 and 19 were rejected under 35 U.S.C. § 102 as allegedly being anticipated by Morrison, U.S. Patent No. 901,545. Claim 1 has been amended to recite that the tee comprises an elongated generally cylindrical *injection molded plastic* main body portion and a cylindrical *injection molded plastic* uppermost hub. It is respectfully submitted that the cast iron plumbing connections disclosed in Morrison do not anticipate claim 1, as amended, or claims 4, 6, and 19, which depend, directly or indirectly, from claim 1.

Claims 1-5, 19, 21 and 23 were rejected under 35 U.S.C. § 102 as allegedly being anticipated by Ramm, U.S. Patent No. 3,633,943. As indicated above, claim 1 has been amended to recite a tee comprising an elongated generally cylindrical *injection molded plastic* main body portion and a cylindrical *injection molded plastic* uppermost hub. It is respectfully

submitted that the two-piece pipe fitting of Ramm, which is described as being formed from a filled thermosetting resin reinforced with glass fiber, does not anticipate claim 1, as amended, or claims 2-5, 19, or 21, which depend therefrom. At a minimum, Ramm lacks teaching of an injection molded plastic main body portion and a cylindrical injection molded plastic uppermost hub. Claim 23 has likewise been amended to recite a tee comprising an elongated generally cylindrical *injection molded plastic* main body portion, and a cylindrical *injection molded plastic* uppermost hub. Thus, it is respectfully submitted that the thermoset resin, glass fiber-reinforced, two-piece pipe fitting of Ramm does not anticipate claim 23, as amended.

**Response to Claim Rejections Under 35 U.S.C. § 103**

Claims 2, 15, 17, 18, 21 and 22 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Morrison, U.S. Patent No. 901,545, in view of Wyre, U.S. Patent No. 1,052,198. Claim 1 has been amended to recite that the tee comprises an elongated generally cylindrical *injection molded plastic* main body portion and a cylindrical *injection molded plastic* uppermost hub. It is respectfully submitted that even if the cast iron plumbing connections disclosed in Morrison were combined or modified according to or in view of the cast metal culvert half-pipes disclosed in Wyre, they would not result in Applicant's claims 2, 15, 17, 18, 21 or 22. One of ordinary skill in the art, seeking to manufacture an injection molded plastic part for use at the inlet or outlet of a septic tank, would not look to cast iron plumbing connections or cast metal culvert half-pipes, alone or in combination with one another, for a solution. It is therefore respectfully submitted that the Morrison and Wyre references are non-analogous, and therefore too remote to be treated as prior art in a rejection under 35 U.S.C. § 103. *In re Clay*, 23 USPQ2d 1058, 1060 (Fed. Cir. 1992).

Claim 6 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Ramm, U.S. Patent No. 3,633,943, in view of Morrison, U.S. Patent No. 901,545. Claim 6 depends from claim 1, as amended, and therefore includes the language as to the main body portion and uppermost hub being injection molded plastic. It is therefore respectfully submitted that the proposed combination of Ramm in view of Morrison would not result in claim 6. At a minimum, the two-piece pipe fitting of Ramm, formed from a filled thermosetting resin reinforced with glass fiber, in view of what is characterized in the Office Action as Morrison's illustration of the use of a reducer to permit a pipe of a first or a second outer diameter to be received in a tee, does not result in a tee with an elongated injection molded plastic main body portion and an injection molded plastic uppermost hub.

Furthermore, as indicated in Paragraph 6 of the Applicant's August 6, 2003 Affidavit, Morrison does not even teach that it is known in the art to have a tee adapted to receive a pipe of a first or second outer diameter by using a reducer. In Figure 8 of Morrison, the figure cited in the Office Action, Morrison shows a ring a<sup>6</sup> inserted in a cast iron plumbing connection to operate as a stop for the end of a succeeding tee. The ring a<sup>6</sup> is described in the first column of page 2 of the written description of Morrison to be insertable in the event a slip joint were not desired. There is no teaching in Morrison of a pipe received inwardly of the ring a<sup>6</sup>.

It is respectfully submitted that the Office Action does not proffer a legitimate motivation for modifying Ramm in view of Morrison in the proposed manner, and therefore does not establish a prima facie case of obviousness of claim 6. The only motivation proffered in the Office Action is "in order to adapt a bigger and larger filter and to adapt different pipes with different outer diameters." Because there is no need to adapt bigger and larger filters, this proffered motivation is insufficient to support the rejection. Neither Ramm nor Morrison discuss

or identify this purported need to adapt bigger and larger filters as a problem facing the industry. Adapting bigger and larger filters was not a problem the Applicant was trying to solve.

As discussed on page 4 of the Applicant's specification, most known commercial effluent filters require a generally cylindrical housing extending to cover much, if not all, of the extended length of the effluent filter, so that filtered effluent may reach the outlet port of the tee, and the tank portion of the system, but without again mixing with unfiltered sewage. This need to cover the extended length of conventional effluent filters was not adequately met by conventional pipe tees alone, since conventional pipe tees were formed as relatively short-length plumbing couplings. The problem facing the industry, and the Applicant, was not some need to adapt a bigger and larger filter, but rather, the widespread use of conventional plumbing tees of inherently inadequate length to accommodate the existing elongated filters without the additional use of a pipe extension, at increased cost, labor, and waste of unused cut-off pipe.

Inasmuch as Figure 8 of Morrison does not teach or suggest the use of a reducer to adapt a tee to receive pipes having different outer diameters, the Office Action also cannot show that Morrison is known among those having ordinary skill to be a reference having special importance in the Applicant's field for such a teaching.

The proffered motivation therefore was not derived from any of the recognized sources for permissible, objective motivations to combine references in support of a Section 103 rejection. *See, e.g., Akamai Technologies v. Cable & Wireless Internet Services Inc.*, 68 USPQ2d 1186, 1193 (Fed. Cir. 2003) (listing, as possible sources of a suggestion to combine prior art references, (1) the nature of the problem to be solved, (2) the teachings of the pertinent references, and (3) the ordinary knowledge of those skilled in the art that certain references are of special importance in a particular field).

Claim 16 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Morrison, U.S. Patent No. 901,545 in view of Wyre, U.S. Patent No. 1,052,198, as applied to claim 15, and further in view of Pinion, U.S. Patent No. 4,798,028. Claim 16 depends from claim 15, as amended. As such, it is respectfully submitted that the proposed combination of Morrison in view of Wyre, and further in view of Pinion, would not result in the Applicant's claim 16. At a minimum, combining the cast iron plumbing connection of Morrison, the reinforcing ribs of the metal pipes as taught by Wyre, and the use of a screen in a downspout trap of Pinion, would not result in an injection molded plastic main body portion.

Furthermore, it is respectfully submitted that the newly-cited Pinion reference is non-analogous. Prior art is considered analogous, and thus available as a reference under 35 U.S.C. § 103, when one of two criteria are satisfied: (1) if the reference is from the field of the inventor's endeavor, regardless of the problem addressed; and (2) if the reference is not within the field of the inventor's endeavor, if the reference is reasonably pertinent to the particular problem with which the inventor was involved. *In re Clay*, 23 USPQ2d at 1060. The Pinion reference does not satisfy either of these criteria. A downspout trap and cleanout is not from the Applicant's field of endeavor. Nor is Pinion reasonably pertinent to the particular problem with which the Applicant was involved. The screen (15) used in Pinion would be entirely inadequate for use as an effluent filter in a septic tank system. On multiple occasions, the Office Action refers to an "efficient" filter. However, claim 16 recites an "effluent" filter, not an "efficient" filter. Effluent is a term which those of ordinary skill in the art associate with sewage or wastewater. It is therefore respectfully submitted that the Pinion reference is not applicable, and withdrawal of the rejection of claim 16 is respectfully solicited.

Claim 20 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Morrison, U.S. Patent No. 901,545 in view of Pinion, U.S. Patent No. 4,798,028. Claim 20 depends from claim 1, as amended. As such, it is respectfully submitted that the proposed combination of Morrison in view of Pinion, would not result in the Applicant's claim 20. At a minimum, combining the cast iron plumbing connection of Morrison and the use of a screen in a downspout trap of Pinion, would not result in an injection molded plastic main body portion. As discussed above with respect to claim 16, the Pinion reference is also non-analogous art, so it is requested that the rejection of claim 20 be withdrawn.

#### **Response to Arguments Concerning Affidavits**

The Office Action challenges the persuasiveness of the November 26, 2002 and August 6, 2003 Affidavits under 37 CFR § 1.132 presented by the Applicant. The November 26, 2002 and August 6, 2003 affidavits presented documented demonstrations of commercial success and copying by others. In further support of the non-obviousness of the Applicant's claims, a third Affidavit Under 37 CFR 1.132 is submitted herewith, setting forth yet additional evidence of commercial success. According to the Office Action, the Applicant explains in his first two affidavits how the sales of his product "increase," but allegedly fails to explain why the sales increase, and the Applicant allegedly fails to demonstrate his invention with respect to other devices that are in the market.

It is respectfully submitted that these alleged shortcomings of the affidavits only address the secondary consideration of commercial success. As to commercial success, it is conceded in the Office Action that the affidavits explain "how the sales of [Applicant's] product 'increase'." The affidavits are purportedly deficient for failing to demonstrate why the sales increase. The Federal Circuit has rejected a standard requiring an applicant to submit evidence of, for example,

market share data in order to provide a showing of commercial success sufficient to overcome a prima facie case of obviousness. *Tec Air, Inc. v. Denso Manufacturing Michigan Inc.*, 192 F.3d 1353, 1361 (Fed. Cir. 1999)(rejecting argument that market share data is necessary to prove commercial success; and finding “sales figures alone are also evidence of commercial success.”).

Furthermore, when one considers the types of products that the TB-4 T-Baffle tee replaces, it is readily appreciated that data concerning sales of such other products would not be useful to demonstrate the remarkable commercial success of the TB-4 T-Baffle. More specifically, as discussed in the “Background” section of the present patent application, “[o]lder concrete septic systems utilized cast-in concrete baffles at the inlet and outlet of the system.” (P. 1).

An alternative has been the use of “standard tees or sweep tees manufactured *primarily* for use in plumbing applications, such as for pipe joints or couplings.... [and] a length of PVC pipe cut down to fit one end of the available plumbing tees, and of sufficient length to cover the sealing gasket used with many of the known single-pass effluent filters.” (Pp. 2, 4) (emphasis added). Third Affidavit, ¶ 23.

Even if sales data from the period 2001-2004 for such conventional cast-in concrete baffles, plumbing tees, and lengths of PVC pipe were available, these products have such a myriad of uses other than at the inlet or outlet of septic tank systems that a comparison of sales with the Tuf-Tite TB-4 T-Baffle tees would, respectfully, be meaningless and not helpful toward determining whether there has been commercial success of the Tuf-Tite TB-4 T-Baffle. Third Affidavit, ¶ 24.

What is remarkable about the sales growth of the Tuf-Tite TB-4 T-Baffle tee has been the widespread and ever-growing acceptance and interest in the Tuf-Tite TB-4 T-Baffle tee as an

alternative to products or structures primarily intended for other purposes, but which had been the standard for housing effluent filters used at the outlet of septic tanks or for directing flow of wastewater into septic tanks. Third Affidavit, ¶ 25.

As indicated in Mr. Meyers' Third Affidavit, sales of the TB-4 T-Baffle tee have continued to increase. The rate of increase of TB-4 T-Baffle tees, made in accordance with the claims pending in the present application, is particularly significant when compared to the rate of increase of Tuf-Tite's EF-4 effluent filters, which are the subject of U.S. Patent Nos. D431,629 and 6,319,403, and intended for use in the TB-4 T-Baffle tee. As indicated in Paragraphs 15-16 of the Third Affidavit, it would have been Mr. Meyers' expectation that sales growth of the EF-4 effluent filter would have tracked closely with sales growth of the TB-4 T-Baffle tee, or at best, sales of the TB-4 T-Baffle tees in a particular year would be double sales of EF-4 effluent filters. Contrary to these expectations, in the period from March 1, 2004-February 28, 2005, sales of the TB-4 T-Baffle tees were substantially more than double sales of the EF-4 effluent filter. Specifically, 39,295 EF-4 effluent filters, as compared to 99,531 TB-4 T-Baffle tees. Third Affidavit, ¶ 19.

The Office Action also ignores the unrefuted evidence of copying by others detailed in the August 6, 2003 Affidavit. Copying by others is a well-recognized secondary consideration of non-obviousness. Evidence of copying by others, when presented, must be considered and given its proper weight. *See, e.g., Diversitech Corp. v. Century Steps, Inc.*, 7 USPQ2d 1315, 1319 (Fed. Cir. 1988) ("Copying is an indicium of nonobviousness, and is to be given proper weight."). As described in the Third Affidavit submitted herewith, and as shown in the exhibits to the Third Affidavit, yet another competitor of Tuf-Tite, Inc., the assignee of the present application, has now introduced a tee that copies many of the features claimed. Even assuming,



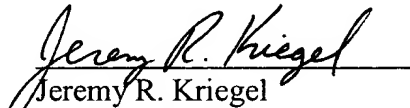
*arguendo*, a prima facie case of obviousness were established, which is not conceded by the Applicant, the evidence that two competitors have now copied the Applicant's invention, coupled with the extensive evidence of commercial success, is more than sufficient to meet any burden on the Applicant to overcome such a prima facie case.

**Conclusion**

For the foregoing reasons, it is submitted that the claims pending in the application are in condition for allowance. The Examiner's favorable action is respectfully solicited.

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Respectfully submitted,

  
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